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NATIONAL DEFENSE—CONSTITUTIONALITY OF PENDING LEGISLATION.*

The "Bill to Increase the Efficiency of the Organized Militia and for Other Purposes",¹ may have been intended to give such of the militia as had agreed to serve the United States, and taken an oath so to do when called upon, the same status as members of a volunteer army, as heretofore defined, who have enrolled themselves to serve in the army when and where called upon, essentially as did volunteers for the War with Spain for example, but a "muster in" is necessary before such volunteers are "accepted" by the government and subject to the Articles of War.

It may be that it was intended to give men the so-called "status" of United States soldiers by permitting them voluntarily to sign an agreement to serve when and where called upon and thus virtually to enroll themselves in the service of the United States by signing the agreement and taking the oath, but allowing them, until called by the President with the consent of Congress, to remain under the exclusive control of the governors of the respective states as commanders-in-chief. They would thus remain militia while subject to state control but would be taken by the United States under the power "to raise armies"² and not under the power over the militia,³ thus rendering them available for foreign service, which if taken as militia they would not be.

With reference to the control over volunteer organizations and the question as to whether the fact that they would become volunteers under the call would disturb or destroy state control

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¹ "Militia Pay Bill," so called, introduced by Senator Chamberlain, 63rd Congress, 2nd Session, as S. 6217; also 64th Congress, 1st session (Dec. 10, 1915), as S. 1158. The contents are identical but section numbers are different. Section 33 in S. 6217 is Sec. 32 in S. 1158; Sec. 34 is Sec. 33; Sec. 38 is Sec. 37; Sec. 38a is 37a, etc.

² Article I, Section 9, of the Constitution of the United States.

³ *Ibid.*, Art. I, Sec. 8.

we find that previous to such "muster in" such persons as have enrolled themselves, or otherwise indicated their intention to enter the volunteer service, continue subject to the exclusive jurisdiction and control of the governors of the respective states. By undergoing the process of "muster in" such organizations of volunteers may be "accepted" into the military service of the United States and pass out of state control and into the exclusive control and jurisdiction of the United States as part of its volunteer forces.⁴

The entry of a soldier into the service of the United States consists of two acts of volition.⁵ One is the offer to enter the service and the other the accepting and carrying out of the offer. The enrollment for service is only a proposal to enter such service,⁶ a declaration or readiness to do so, and before a man who makes such declaration can become a soldier in the military service of the United States it is necessary that his proposal be accepted by a duly authorized representative of the United States. This acceptance is manifested by the "muster in."

It would seem therefore that even an "agreement to serve"⁷ may not be sufficient to bring such men, members of the militia, under the jurisdiction of the United States but that a "muster in" may be necessary if reliance is to be placed upon the militia coming into the United States service as volunteers as heretofore defined.

Must such men be formally "mustered in" or will some less formal act constitute such muster, particularly when considered in connection with the agreement to serve? It has been repeatedly held that "to give a citizen the status of the United States soldier . . . his consent and that of the United States are both necessary, and the formality which makes the agreement of the two parties to the contract and the commencement of the obligation thereunder is the muster in".⁸

⁴ Howland's Dig. Op. J. A. G. of the Army, p. 1040

⁵ Howland Dig. Op. J. A. G., 1041.

⁶ 23 Op. Atty. Gen. U. S. 406.

⁷ S. 6217, 63rd Congress, 2nd Session, Section 38.

⁸ 23 Op. Atty. Gen. 408; Howland Dig. Op. J. A. G. 1042.

It long has been recognized that a "muster in" is "the final act which closes a contract between a person and the Government and fixes certain relations between them"⁹ but it has likewise been held that a "constructive muster in" meets the requirements of law equally with a formal muster. A "muster in" is not necessarily formal. In some cases indeed there was no formal "muster in," and it has been held that placing a man on duty or availing of his services, or treating him as duly in the military service, or paying him as a soldier, or taking his name upon the rolls and accepting his services as a soldier, was a "constructive muster in".¹⁰

In other words if a man's services are accepted and he is duly paid as a soldier, such treatment implies full acceptance of the contract of enrollment and enlistment in the army and no further evidence as, for instance, formal examination and oath, is necessary in order that he be considered as having assumed the status of a soldier in the Army of the United States. If therefore the elements exist in the relations between such men and the United States a formal "muster in" has been waived, notwithstanding that mere enrollment creates only a liability of men enrolled to be called and does not put them into the military service of the United States.¹¹

The sections of the act as a whole seem to provide for a sort of volunteer militia, placing the men who sign the "agreement to serve" and who have taken an oath "in the army" in the position of having assumed an obligation which is a continuing contract in the nature of a status as a United States soldier.

Until such time as Congress consents that they "be ordered into the active military service of the United States" such militia are under the control of the respective governors but when Congress has consented, they may be considered as "mustered in" and their full status determined by such consent and order without further formality. If, therefore, a militiaman had indicated his refusal to serve in the army of the United States by some

⁹ Howland's Dig. Op. J. A. G. 1043.

¹⁰ See citations in Howland Dig. Op. J. A. G. 1041.

¹¹ Howland Dig. Op. J. A. G. 623.

act, as the repudiation of the agreement or otherwise, before consent by Congress or the issuance of an order, he would probably be subject only to penalty and not to the Articles of War, but if no such action were taken, and such action is highly improbable, before consent by Congress and order issued, he would be "accepted" and compelled to serve, or failing, would be subject to the Articles of War, and that regardless of any action which the state authorities might or might not take.

Section thirty-four of the act¹² provides that the muster shall take place when the militiamen "shall be called forth in the manner hereinbefore prescribed" so the act itself contemplates that full status in the army shall not be obtained until muster has taken place, which shall be only when Congress has given its consent and the militia has been ordered to active service. This refers to the use of the militia as such under the power of Congress over the militia and not to the power of Congress "to raise armies."

But has not the militiaman who has not only enlisted to serve the state but also has "voluntarily subscribed an agreement to serve the United States . . . and taken an oath . . . in the Army of the United States"¹³ done something more than become a member of the militia and enroll for services with the United States?

The agreement to serve and the oath, would seem to be something more than mere enrollment, for enrollment seems to create only a liability of men so enrolled to be called out and does not put them into service.¹⁴ While it is true that this agreement does not put such men in service strictly, for this is not fully accomplished without certain other steps as hereafter outlined, nevertheless such men are under oath to serve, and following a lawful order by the President, could be punished under the Articles of War for failure to serve.

This agreement and oath and the operation of the same to create the dual obligation to serve seems to violate no constitu-

¹² S. 6217, 63rd Congress, 2nd Session.

¹³ Section 38, S. 6217.

¹⁴ Howland Dig. Op. J. A. G. 623.

tional principle. The clause of the Constitution under which such a question might be raised provides, "No state shall, without the consent of Congress keep troops".¹⁵ But compare the language of this clause with that of another clause in the same section of the Constitution: "No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal . . .".¹⁶ It is evident in the latter clause that no state is under any circumstances to enter into a treaty or do the other prohibited acts, but in the former clause it is only provided that no state shall so act without the consent of Congress.

And if militia having taken such an oath are considered to be "troops" within the meaning of the Constitution, will not Congress be taken to have consented by provisions such as here discussed incorporated in a bill providing for the organization of such militia?

However keeping state militia under arms according to a state code or subject to state control is not to "keep troops" within the meaning of the Constitution. And when they pass from the control of the state to that of the United States with the consent of Congress, they are in any event, no longer state, but federal, troops. Active militia organized and enrolled under a state military code for discipline and not for military service, except in case they are called out to execute the laws, suppress insurrection or repel invasion, have been held not to be "troops" within the meaning of the Constitution. The fact that parts or the whole of such militia have agreed to respond to the call of the President, with the consent of Congress, would hardly make them "troops" until such call and consent had been given, for, as heretofore shown, they are not considered "part of the army" until mustered, actually or constructively, and until then are under the jurisdiction of the respective states. And they are not "troops" unless part of the "army", for "troops" and "army" are synonymous terms.¹⁷

¹⁵ Art. I, Sec. 10, Clause 3.

¹⁶ Art. I, Sec. 10, Clause 1.

¹⁷ State v. Wagener, 74 Minn. 518 (1898).

It may be considered settled that active militia organized under a state statute do not come within the prohibition of the Constitution, even though such militia may be subject to federal service. The Supreme Court of Illinois has said upon this subject:¹⁸

"Lexicographers and others define militia, and so the common understanding is, to be 'a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies in time of peace'. That is the case as to the active militia of this state. The men comprising it come from the body of the militia, and when not engaged at stated periods in drilling and other exercises, they return to their usual avocations, as is usual with militia, and are subject to call when the public exigencies demand it. Such an organization no matter by what name it may be designated, comes within no definition of 'troops' as the word is used in the Constitution. The word 'troops' conveys to the mind the idea of an armed body of soldiers, whose sole occupation is war or service answering to the Regular Army. The organization of the active militia of the state bears no likeness to such a body of men. It is simply a domestic force as distinguished from regular 'troops' and is only liable to be called into service when the exigencies of the state make it necessary."

In many ways the militia are similar to men of the Regular Army or "troops" so called. The Constitution has provided that Congress is "to provide for organizing, arming and disciplining the militia"¹⁹ and Congress did by the Act of 1903 provide for the same sort of equipment for the militia as is used in the army and that they be like the army in other respects. Moreover they are drilled in armed encampment in the same manner and after the same plan as the army and by army officers.

The essential difference is that the army is governed by the President and by officers appointed by the President, with the consent of the Senate, and acts under the rules and regulations of Congress, the army, and the Secretary of War, and are always on duty and paid accordingly, while the militia observes mainly the rules or codes of the respective states and are only in the service when they are called out on some duty by the state authorities or by Congress under its powers in the Constitution,

¹⁸ *Dunn v. People*, 44 Ill. 130 (1879).

¹⁹ Art. I, Sec. 8, Clause 16.

at other times attending to their business or professional occupations. Congress, and the President, and the Secretary of War have large powers over the militia even when not in actual service, however, and the full extent of these powers has been fully tested.²⁰

The militia, it will be seen, therefore, cannot properly be called "troops" within the meaning of the prohibition of the Constitution, or if they be so considered, Congress will be taken to have consented by the legislature and so have complied with the Constitution.

But an important question at once arises. The militia who have signed the agreement to serve and have taken the oath being volunteers, and assuming that by the agreement they have done something more than "enroll" so that no formal muster is necessary, or that the call would constitute a constructive muster, and that their maintenance by the states, at least in part during times of peace, is not a violation of the Constitution, are they available for service without the boundaries of the United States? In other words, can the government compel such militia to perform *foreign* service without having them expressly volunteer for it?

The Act provides:

"That the President with the consent of Congress, in time of war, or when war is imminent, or in grave international emergency requiring the use of troops in excess of the Regular Army of the United States, may order into the active military service of the United States as a part of the army thereof any portion of the Organized Militia having subscribed the agreement and oath . . . and any Organized Militia so ordered . . . shall be available for any duty for which the Regular Army may be employed. . . ." ²¹

Is this language effective for the purpose intended, and does it meet the constitutional objections to the provisions of the present statute known as the "Dick Bill"? ²²

Whether the militia as such can be called to serve with the regular army on any service which would include foreign service

²⁰ See War Department Circular No. 8, issued by Secretary of War August 1, 1913.

²¹ Section 38a, S. 6217.

²² Act of January 21, 1903, and amendment of 1908.

has been a much discussed question of constitutional law with the undoubted weight of the authorities recognizing the enumerated instances in which the militia may be used as the extent of the power and barring the right to use the militia in any other capacity than "to execute the laws of the Union, suppress insurrections and repel invasions."²³ It is said that under these terms such use is restricted to use within our own boundaries, except possibly in case of repelling invasion.

The so-called Dick Bill of 1903 was almost a re-enactment of the Bill of 1795 governing the militia. Section four provided that the militia shall be called out whenever the United States is invaded, or in danger of invasion from any foreign nation or rebellion against the authority of the government, or whenever the President is unable, with the regular forces, to execute the laws of the Union. Congress was impelled to enact the legislation, and make use of the power, which had been dormant for over a hundred years, to organize, to arm, and to discipline the militia, by revolutions growing out of the War with Spain in 1898. It was found at that time that the militia of the different states were not uniformly organized, armed, or disciplined, and the bitter experience resulting from the consequent disappointment, delay, sickness, and death led Congress to bestir itself to create a more satisfactory system which would prevent a recurrence of such unnecessary and, what might have been against a stronger power, wholly disastrous confusion.

The amendment of 1908 to the Dick Bill provided that when the militia are called out it shall be for the term of their enlistment, whereas the Dick Bill, as a compromise in order to insure its passage by Congress, had included a provision that they should serve nine months. It also provided that when the militia are called they shall be preferred to any "volunteer force," using that term in its commonly accepted sense and not as herein defined. And the amendment further provided that when the militia are called out, they may be called for service "either within or without the territory of the United States."

²³ Art. I, Sec. 8, Clause 15, Constitution of United States.

With reference to this question of foreign service the Attorney General of the United States, Mr. Wickersham, in response to a request by the Secretary of War for an opinion as to whether the President has authority to send the Organized Militia into a foreign country with the Regular Army as part of an army of occupation, especially should the United States intervene in the affairs of such country under conditions short of actual warfare, said:²⁴

"From very early times, in both England and this country, the militia has always been considered and treated as a military body quite distinct and different from the regular or standing army, governed by different laws and rules, and equally different as to the time, place or occasion of its service. One of the most notable points of difference is this: While the latter was in the continued service of the Government and might be called into active service at all times and in all places when armed force is required for any purpose, the militia could be called into the actual service of the Government only in the four special cases provided for by law. Their service has always been considered as of a rather domestic character, for the protection and defense of their own country, and the enforcement of its laws. . . .

"When the Constitution gives to Congress the power 'to raise and support armies' and to provide 'for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions', and makes the President 'the Commander-in-Chief of the Army and Navy of the United States, and the militia of the several states when called into the actual service of the United States' it is speaking of two different bodies, the one the Regular Army, in the continuous service of the Government, and liable to be called into active service at any time or in any place when armed force is required; and the other a body for domestic service, and liable to be called into the service of the Government only upon the particular occasions named in the Constitution, any acts of Congress relating to the army and the militia must have the same construction.

"It is certain that it is only upon one or more of these three occasions—when it is necessary to suppress insurrections, repel invasions, or to execute the laws of the United States—that even Congress can call this militia into the service of the United States or authorize it to be done. . . .

"I think that the constitutional provisions here considered . . . by the careful enumeration of the three occasions or purposes for which the militia may be used . . . forbid such use for any other purpose; and your question is answered in the negative."

²⁴ Opinion of Attorney General, Feb. 17, 1912, 29 Opinions Atty. Gen. 323.

This opinion undoubtedly correctly states the law and the provisions of the Dick Bill upon the subject are no doubt unconstitutional. It was the intention that the "militia" should be used mainly, if not solely, for domestic purposes.

But we are here but indirectly concerned with the provisions of the present statute, the so-called Dick Bill, upon the subject. The question is: Do the provisions in the proposed bill²⁵ meet the objections? The objections raised apply to the use for foreign service of the militia as such. If entering into the agreement to serve and taking the oath makes such of the militia as sign the agreement and take the oath something more than militia, that is, makes them volunteers in fact under the power of Congress "to raise armies", which volunteers are accepted by the government by a muster, constructive in character, then the above restrictions do not apply and such militia may be used for foreign service.²⁶

Whether or not sections thirty-eight and thirty-eight *a* of the bill under discussion are constitutional, depends upon the extent of the various grants of power to Congress with reference to military power, together with certain inherent national powers. The Congress of the United States is given power (1) "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions";²⁷ and (2) "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."²⁸

The Congress is also given power (1) "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and sea",²⁹ (2) "to raise and support armies",³⁰

²⁵ Sections 38 and 38*a*, S. 6217.

²⁶ See opinion by the writer as Judge Advocate General of Illinois, 1912, "Militia Pay Bill," H. R. 8141, 62nd Congress, 2nd Session.

²⁷ Art I, Sec. 8, Cl. 15, Const. of United States.

²⁸ Art. I, Sec. 8, Cl. 16, *Ibid*.

²⁹ Art. I, Sec. 8, Cl. 11, *Ibid*.

³⁰ Art. I, Sec. 8, Cl. 12, *Ibid*.

(3) "to provide and maintain a navy",³¹ (4) "to make rules for the government, and regulation of the land and naval forces".³²

The Constitution further provides:

"The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States."³³

The Congress and the respective states each have authority over the militia of such states, but when there is a conflict of particular authority, Congress is supreme because its power is plenary.³⁴ The extent of these grants of power to Congress always has been the subject of much debate and considerable litigation.

The power of Congress to use the "militia" as such is limited to that section which provides for "calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions",³⁵ and its only other power over the "militia" as such is found in the clause with reference to their organization, arming, and discipline. Its power is strictly limited to the purposes hereinbefore set forth and what may be reasonably implied from the words used. It is a grant of power and is not to be exceeded.³⁶ The remaining power is left to the respective states.

As has been seen from the opinion of the Attorney General of the United States³⁷ and the views expressed herein, the provision of the present Dick Law which provides for the transfer of the militia to the army for service within or without the territorial limits of the United States, is not constitutional. It is not within the plain intent and certain meaning of the language of the Constitution heretofore discussed. We must look to the constitutional power of Congress "to raise armies"³⁸ if we are

³¹ Art. I, Sec. 8, Cl. 13, *Ibid.*

³² Art. I, Sec. 8, Cl. 14, *Ibid.*

³³ Art. II, Sec. 2, Cl. 1, *Ibid.*

³⁴ *Gibbons v. Ogden*, 9 Wheaton, 1 (1824).

³⁵ Art. I, Sec. 8, Cl. 15, Const. U. S.

³⁶ *Gibbons v. Ogden*, *supra*, note 34.

³⁷ See *supra*, note 24.

³⁸ Art. I, Sec. 8, Cl. 12, Const. U. S.

to sustain the constitutionality of any act looking to the use for foreign service of any part of the militia, and not to any power which Congress has over the militia as such.

The power to raise armies has been held to be unlimited. It has been said of Congress in this respect:

"The creation of these powers fall within the line of its duties; and its control over the subject is plenary and exclusive. It can determine without question from any state authority how the armies shall be raised, whether by voluntary enlistment or by forced draft, the age at which a soldier shall be received. . . ." ³⁹

No reservation of power was left by the Constitution to the states to raise armies and we have found that it was specifically denied them to keep "troops" or armies of any kind, except with the consent of Congress. The power of Congress then being unlimited and exclusive, great scope can be given to the power "to raise armies" but in the exercise of it, care should be taken that the rights of the respective states are not encroached upon. ⁴⁰

In the exercise of the power of the President with the consent of Congress to call forth such militia "in time of war, or when war is imminent, or in grave international emergency" as provided for in the legislation in question, ⁴¹ Congress has power over the state militia and over individuals composing it or the individual citizens of a state, superior to that of the states themselves. Congress is supreme in all that pertains to war for it alone has power "to declare war", ⁴² but the power over the militia is exercised or rather exists concurrently in some cases. With reference to the militia, in the absence of legislation by Congress "to provide for organizing, arming and disciplining the militia" ⁴³ the state authorities can pass laws governing the same, but when Congress acts, as it did in 1903 and in 1908 and as it is proposed to do now, then the particular legislation so enacted becomes the law, and state laws on this particular matter or subject, if they are inconsistent with the acts of Congress, are ren-

³⁹ Tarble' Case, 13 Wall. 397, at p. 408 (U. S. 1871).

⁴⁰ Art. II, Const. U. S.

⁴¹ Section 38a.

⁴² Art. I, Sec. 8, Cl. 11, Const. U. S.

⁴³ Art. I, Sec. 8, Cl. 16, *Ibid.*

dered nugatory.⁴⁴ Although the power with reference to the militia is not exclusive when Congress never has exercised its power to organize, arm, and discipline the militia, such laws are the supreme law of the land, and all interfering state statutes or regulations must necessarily be suspended in their operation.⁴⁵

The Secretary of War has recently strikingly exercised this power and by Executive order has promulgated rules and regulations for the organizing, arming, and disciplining the militia, claiming the right under the powers conferred upon him through certain legislation by Congress under this grant of power, and such regulations have been carried into effect, though contrary to state statutes and in violation of state regulations. And notwithstanding this, the states have accepted them and have been compelled to accept them if they desired to participate in federal allotment to militia.⁴⁶ This indicates how far the government might go toward federalizing the militia even under present inadequate legislation, if it makes up its mind to depend upon it and to exercise its power to its fullest extent.

But while the power of Congress over the militia is concurrent in some instances with that of the states, the power of Congress over war and the armies necessary to conduct war is exclusive.⁴⁷ If the use of the members of the militia making the agreement and taking the oath, is based upon the power of Congress to raise armies it is exclusive, and from the moment of acceptance destroys state control. They are taken as "volunteers" and not as "militia" and the President may, notwithstanding the provisions of the Constitution with reference to the appointment of officers of the militia by the states,⁴⁸ retain or change the officers at his discretion.⁴⁹

⁴⁴ Opinion of Justices, 14 Gray 614 (Mass. 1859).

⁴⁵ *Houston v. Moore*, 5 Wheaton 1 (1820).

⁴⁶ War Department Circular No. 8, issued by Secretary of War, Aug. 1, 1913. See also Report of Efficiency and Economy Commission, Illinois, 1915, p. 896.

⁴⁷ *Tarble's Case*, *supra*, note 39.

⁴⁸ Art. I, Sec. 8, Cl. 16, Const. U. S.

⁴⁹ Volunteer Act of 1914, Act of Apr. 25, 1914. See also Report of Efficiency and Economy Committee, Illinois, 1915, p. 896.

The bill under discussion declares who shall *compose* the militia⁵⁰ and with reference to that subject acts under the power of Congress under the Constitution to organize the militia.⁵¹ It provides for those members of the militia who sign an agreement to serve, and take an oath to serve in the army when ordered with the consent of Congress, and creates thereby a class or grade of militia distinct from those not entering into such an obligation. It classifies the militia, splits it into two parts, (1) those signing an agreement and taking an oath to serve, and (2) those not signing the agreement or taking the oath. It is in terms stating the composition of the militia. The power to determine who shall *compose* the militia is vested in Congress, and after it has been exercised by Congress, a state legislature cannot constitutionally provide for the enrollment of any other persons in the militia.⁵²

The power of Congress to organize the militia is plenary and whenever exercised by Congress all state laws inconsistent therewith are null and void. This power to organize means to bring all parts into effective and systematic correlation and co-operation. The courts have said, "Organizing obviously includes the power of determining who shall compose the body known as the militia".⁵³

The term "organize" has further been used to include arranging the groups or units of organization, and prescribing the number, grade, and functions of the officers and men composing the organization.⁵⁴ The power to organize looks also to the organization or arrangement of the militia into divisions, regiments, *etc.*⁵⁵

It is seen therefore that the power to organize covers a wide field of operations. It hardly can be disputed that if Congress is given the right to classify or divide the militia into the *organized*

⁵⁰ Sections 38 and 38a.

⁵¹ Art. I, Sec. 8, Cl. 16, Const. U. S.

⁵² Opinion of Justices, *supra*, note 44.

⁵³ *Ibid.*

⁵⁴ 1 Statutes 222, Statutes 132, 3 Statutes 96, 9 Statutes 12, 12 Statutes 268, 30 Statutes 361.

⁵⁵ Tucker's Constitution, p. 583.

and the *unorganized* militia, and has power further to divide the organized militia into divisions, brigades, regiments, or other tactical units, it would likewise have power to divide the Organized Militia still further so that it would be classified as, (1) men who are liable for any federal service, having signed an agreement and taken an oath to serve, and (2) men who are liable only for such service as the militia can be used for under the Constitution, and who have not signed an agreement or taken an oath to serve. Of course, however, it could not encroach upon the rights of the states or the individuals comprising the militia.

The Supreme Court of the United States has said:⁵⁶

"Congress has power to provide for organizing, arming and disciplining the militia, and this power being unlimited except in the two particulars of officering and training them, according to the discipline to be prescribed by Congress, it may be exercised to any extent that may be deemed necessary by Congress."

The right of Congress being clear, as against the states, to organize the militia, to classify them, to arrange them in tactical units, we turn to the question whether the exercise of that power violates any constitutional rights of the individual citizen. The citizen is secured under the Constitution, the inalienable right of life, liberty and property.⁵⁷ His power to contract is a right of property from which he cannot be deprived without due process of law⁵⁸ and in contracting he may voluntarily enter into any contract to dispose of that property, providing of course he does not contravene some other law in so doing.

To sign an agreement to serve in the state militia and in the United States Army, or to sign an enrollment, is a legal contract. It is an agreement which constitutes an offer which the citizen has the legal right to make, and acceptance by the Government, either by pay, constructive muster, or actual service results in a contract.⁵⁹ It is no less a contract because it is entered into with the sovereign, although for a breach of it the militiaman could

⁵⁶ *Houston v. Moore*, *supra*, note 45, at p. 16.

⁵⁷ Art. V, Amends. to the Const.; Art. XIV, Amends. to the Const.

⁵⁸ *Ritchie v. People*, 155 Ill. 98 (1895).

⁵⁹ *In re Grimley*, 137 U. S. 147 (1890).

not sue.⁶⁰ The signing of such an agreement or enrollment creates a relation in the nature of a status, but as in the case of a marriage, it is no less a contract; rather it is more than a contract, with certain rights and obligations annexed to it.⁶¹

As heretofore pointed out, the agreement to serve contemplated by the act under discussion may or may not have been intended to be an "enrollment" in the army, but legally it amounts to that. At any rate such "agreement" is a contract between the members of the militia and the United States, the consideration being a certain percentage of the regular army pay to be paid the militiaman in return for the agreement to serve the United States whenever called with the consent of Congress. The principal element of a valid contract is present, a detriment to the promisee—the militiaman who agrees to serve. The transaction constitutes a valid offer and acceptance.⁶²

If, then, such classification of the Organized Militia does not seem to contravene any existing law, and such organization of the militia into two parts or grades, under the power given to Congress "to provide for organizing the militia" is proper, and such agreement to serve when called is a legal contract based upon consideration, has Congress the further power to use *such* militia, having signed such agreement and taken an oath, and in pursuance thereof having been called into active service, for *any* purpose for which the regular army may be used?

It must be remembered that the militia and the army are two distinct forces and that the Constitution in referring to them, does so clearly and distinctly as separate bodies.⁶³ Congress in acting under the clause used in section thirty-eight *a* of the bill discussed, can call out the militia but in so doing must act under constitutional authority and can use the militia only for constitutional purposes.

The bill provides that such militia may be called out in three instances: (1) "In time of war, or (2) when war is im-

⁶⁰ Art. XI, Amends. to the Const.

⁶¹ *In re Grimley*, *supra*, note 59.

⁶² Anson on Contracts, 2nd Amer. Ed., 12, 13.

⁶³ Art. I, Sec. 8, Cl. 12, 15, 16; Art. II, Sec. 2, Cl. 1, Const. U. S.

minent, or (3) in grave international emergency".⁶⁴ Congress is given control over the militia only for certain specified purposes; it has power over the army at all times, and under all circumstances. Its power to use the militia, heretofore shown, is limited to three purposes: (1) "To execute the laws of the Union, (2) to suppress insurrections, and (3) to repel invasions".⁶⁵ All of these then are, in general, war purposes. An *insurrection* is a warlike uprising against the civil or political government which usually results in war although there may not be a declaration of war.⁶⁶ However war can be waged without a declaration of war, as an example of which we have the recent occupation of Vera Cruz. An *invasion* is a warlike entrance into another domain;⁶⁷ and even in executing the laws of the Union war may result; so that in each of the instances in which the militia may be called out, a state of war exists.

The act, then, enumerates three instances in which militia may be called, and all these three relate to a state of war or to a national or international emergency following which a state of war may exist. Such call is well within the constitutional rights of Congress. The theory of the bill is, however, that the militia can only be called out according to the provisions of the Constitution with reference to the militia, for section thirty-three says:⁶⁸

"That whenever the United States is invaded or in danger of invasion from any foreign nation, or of rebellion against the authority of the Government of the United States, or the President is unable with the regular forces at his command to execute the laws of the Union, it shall be lawful for the President to call forth such number of the militia . . . as he may deem necessary to repel such invasion, suppress such rebellion, or to enable him to execute such laws. . . ."

The question then again arises whether the militia—for they are still militia, though perhaps not mere militia, when the call comes—can be called for use in foreign service. According to

⁶⁴ Section 38a.

⁶⁵ Art. I, Sec. 8, Cl. 15, U. S. Const.

⁶⁶ Webster's International Dictionary.

⁶⁷ *Ibid.*

⁶⁸ S. 6217.

the Constitution, as before stated, militia can be called out for only the specified purposes. But according to the better opinion⁶⁹ and clearly under the Volunteer Act of 1914,⁷⁰ militia companies becoming a part of the army are no longer militia but volunteers, and still now under the provisions of this act proposed, having signed the agreement, they would as soon as called to active service, become a part of the Army of the United States, subject to all the rules and regulations of the army including the Articles of War. They are ordered in as the act says, "as a part of the army".⁷¹ Why is not this power exercised not under the power over the militia but under the power to raise armies? If so they are subject to foreign service.

The power of Congress to raise armies has been tested. The general rule always followed is that the power of the nation to protect itself and preserve its own integrity is unlimited. During the Civil War numerous cases arose questioning the constitutionality of the draft and conscript acts, both of the United States and of the Confederate States, compelling men from eighteen to forty-five years to be available for service in the army, in which cases it was held that no one but the governor of the state was exempt. This included members of the state organized militia as well as of the unorganized militia. No question of course arose as to the ability of Congress to use these men so drafted or conscripted into service without the boundaries of the country, but it is illustrative of the measures which Congress can adopt to defend the country and its integrity under the power to raise and support armies.⁷²

These conscript cases brought under consideration the question of the constitutionality of the power as exercised by Congress under its power to raise armies granted by the constitution. The Federal Draft Law was sustained, in litigation resulting from its enforcement, in several states.⁷³

⁶⁹ Efficiency and Economy Commission, Illinois, 1915, p. 896.

⁷⁰ Act of Apr. 25, 1914.

⁷¹ Section 38a.

⁷² See *McCall's Case*, 5 Phila. 259 (Pa. 1863); *Kneedler v. Lane*, 45 Pa. 238 (1863).

⁷³ *Kneedler v. Lane*, *supra*, note 72.

In a number of the Confederate States, the supreme courts passed upon the validity of conscript acts and sustained them, the Confederate States having in their constitution practically the same provisions as the Constitution of the United States with reference to military powers. The Supreme Court of Georgia said:⁷⁴

"The Constitution makes it the duty of the Confederate States to 'protect each of the states against invasion'. To do this they must have the ability to place an adequate military force in the field; hence power was given to the Congress by one clause, 'to raise armies'; by another, 'to provide and maintain a navy'; and by a third, 'to provide for calling forth the militia, to execute the laws of the Confederate States, suppress insurrections, and repel invasions'."

And a number of cases upheld generally the forced draft or conscription into the army of those men even who had sent substitutes in their places, the court asserting that the power of the Confederate States to uphold its integrity was of primary importance, the power to raise armies for the defense thereof was unlimited, and the compulsory enrolling acts therefore constitutional.⁷⁵

If, then, the power of Congress to raise armies extends so far as to compel compulsory enrollment of civilians, it cannot be doubted that the plan of voluntary enrollment under the power to raise armies would be legal. Certainly if a forced draft is constitutional, other enforcement of a contract under which a man has voluntarily enrolled himself and assumed a military status, would be legal. If his constitutional rights are not violated in the former case, they cannot be infringed in the latter.

It has been held that Congress has "the constitutional power to raise armies either by contract or coercion".⁷⁶ The forced draft is coercion of course; the plan here proposed is by contract only with no trace of coercion unless it be in the enforcement of a contract voluntarily assumed and for which a

⁷⁴ Barber v. Irwin, 34 Ga. 28, at p. 31 (1864).

⁷⁵ *Ex parte* Coupland, 26 Texas, 388 (1862); *Ex parte* Tate, 39 Ala. 254 (1864); Jeffries v. Fair, 33 Ga. 347 (1862).

⁷⁶ Burroughs v. Peyton, 16 Grat. 470 (Va. 1864).

consideration has been received. However in either case Congress is acting within the scope of its constitutional powers.

Now if the cases discussed with reference to the power to draft have excluded from the application of such power any part of the organized militia, all of the cases on the contrary assert the view by broad and emphatic language that the militia shall not be excluded from draft, and in the Confederate States, under similar language, the courts held specifically that the organized militia, as individuals, are subject to the power of Congress to raise armies. The Court of Appeals of Virginia said:⁷⁷

"It was not probable that in the exercise of the power to raise armies, Congress would, under ordinary circumstances, intentionally diminish the number of the militia. But it cannot be true that, with a view to preserving the militia entire it was intended to deny to Congress the right to take individuals belonging to it into the regular army."

The power of Congress over war is exclusive. The states cannot declare war. As a necessary part of this power Congress was further empowered to raise and support armies, and as has been previously stated, this power is plenary and exclusive. The power as given in the Constitution carries with it many subordinate powers. It has been said, "The power to make the necessary laws is in Congress, the power to execute in the President. Both powers imply many subordinate and auxiliary powers."⁷⁸ The Constitution specifies the ends to be obtained or the limits within which Congress may act—it has power "to raise and support armies".⁷⁹ This necessarily implies many subordinate powers to accomplish that object and it must perforce enact various laws to carry out the general power. The power to raise armies, as has been seen, is unlimited and can be used even to the extent of a draft to force a man to serve.⁸⁰

There could be no real doubt as to the constitutionality of the proposed bill, if the use of such militia in time of war were placed clearly under the power to raise armies and not under

⁷⁷ *Ibid.*

⁷⁸ *Ex parte* Milligan, 4 Wall. 2 (1866).

⁷⁹ Art. I, Sec. 8, Cl. 12, Const. U. S.

⁸⁰ *Kneedler v. Lane*, *supra*, note 72.

the powers with reference to the militia, had the word "draft" been used instead of the word "order".⁸¹ The word draft was originally used in prior wordings of similar proposed legislation but has since been eliminated as repugnant to the general idea and principle of the act, because the principle of voluntarily assuming the obligation to serve, in consideration of certain benefits, is the plan of the bill, with no thought of compulsion. The use of the word "draft", due largely to the Civil War history of it, is obnoxious to the volunteer and robs him from his point of view of the credit due him for voluntarily assuming the obligation. This feeling is not confined to this country and has recently been made use of for recruiting purposes, as, for instance, in the Duty Campaign for volunteers in England.

The proposed plan constitutes a voluntary enrollment in a volunteer force held in reserve but subject to acceptance by the government at any time and subject to continuing obligations. It violates, as has been seen, no constitutional rights either as to the states or as to the individuals. It does not prevent the citizen from becoming or remaining a member of the state militia, for by merely signing the agreement he does not pass from the control of the state but remains subject to it until he has been accepted by the government by a muster, actual or constructive, or by service, or by other indication amounting to acceptance. There being no limit to the power of Congress to raise armies, there can be no constitutional objection to calling out the militia as a whole or as individuals, or to calling only those individuals in the militia who have signed in advance an agreement to serve and taken an oath so to do. The power to raise armies, as has been seen, is plenary with no fixed limitations, and can be exercised to the full extent necessary to accomplish the necessary end.⁸²

The dual character of the militia exists not only under this legislation but inherently so under the Constitution. It was intended that both the state and nation should have certain powers

⁸¹ Section 38a.

⁸² Tarble's Case, *supra*, note 39.

over it. But Congress was given exclusive control over the armies and the raising and maintaining of them. It was not limited as to when it might recruit those armies. It is limited as to the use of militia as such, but would seem to be free to use such militia as had so enrolled in the volunteer army, free from the restriction as to militia and as a part of its power to raise armies.

The power of Congress cannot be held to be hampered in the exercise of its unlimited and necessary power to raise armies by the fact that one who desires to volunteer his services to the government is at the time a member of the state militia. Otherwise it is conceivable the government might be deprived of the necessary force. It was held in Texas during the Civil War that the right of the state should be disregarded during the time the militia is needed by Congress, for the state must yield to the pressing need of the nation. The court said :⁸³

"The individual is usually an arms-bearing citizen whether he goes with the service voluntarily or otherwise. For surely the doctrine is not to be advanced that individuals, companies, or regiments of the well-regulated arms-bearing citizens necessary to the existence of a free state which have been organized, armed, and disciplined as provided for by Congress and for whom a call is made by the Confederate States in pursuance of the Constitution, cease to be integral parts of the arms-bearing citizens of the state because they preferred to volunteer their services directly to the Confederate Government and it is willing to accept them."

If the power of Congress is such that it can claim militia as individual volunteers, no state right would seem to be violated by calling out in groups or divisions such militia as had agreed to serve. It has been shown that the right of the state over the individual militiaman is subordinate to the right of Congress when it exercises its power. Whether called individually, as they could be to the last man, or collectively, the power of Congress is plenary and exclusive.

There remains still another question. When such militia are called and are fully a part of the army of the United States, the question of officers arises, as to what grade they would as-

⁸³ *Ex parte* Coupland, *supra*, note 75.

sume, what rank they would hold, whether the same as in the militia or in different grades or ranks, and whether the state or the President should appoint the officers. It appears to be the intention of the act ⁸⁴ that such militia shall be organized so far as practicable according to the law and regulations of the regular army, and shall be taken by divisions, brigades, regiments, or independent or separate organizations, including all officers, according to the regulations for corresponding recruits of the regular army.

But as heretofore pointed out, when such militia are taken into the army of the United States they are no longer *militia* according to the best opinion, but *volunteers*, and the form of the organization and the grade and rank of the officers would be subject to the discretion of the President.⁸⁵ A contrary view has been given from the office of the Attorney General of the United States,⁸⁶ but it has not been generally accepted as correctly stating the law.

In conclusion it is submitted that the power exists under the Constitution to bring the militia under full federal control for all purposes, including foreign service, by clearly basing the action upon the power to raise armies. It is believed the language of the present bill does it or could be made to do it by slight verbal changes along the lines suggested.

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⁸⁴ Section 39, S. 6217; Sec. 38, S. 1158.

⁸⁵ Military Dept. of State of Ill., Efficiency and Economy Committee Ill., 1915.

⁸⁶ 22 Op. Atty. Gen. U. S., 228, 536.